

*a***PUBLIC PROSECUTOR****v.****HUSSAIN SUDIN**

HIGH COURT MALAYA, ALOR SETAR

KC VOHRAH J

b

[CRIMINAL TRIAL NO. 57-1 OF 1988]

14 SEPTEMBER 1991

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CRIMINAL PROCEDURE: *Identification parades - Importance of quality of evidence - Need for caution - Guidelines in R v. Turnbull - Recognition vs. identification - Witness shown photographs of accused before parade - Prior to parade witnesses spent time with officer who conducted parade - Accused had dirtiest clothes - Witnesses had seen photographs of accused in newspapers and police posters - Insufficient light - Firearms (Increased Penalties) Act 1971, s. 3 - Penal Code, s. 109.*

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The accused was charged with the offence of abetting a prisoner H to escape from lawful custody and discharging a firearm with intent to cause death or hurt to one M, an offence under s. 3 of The Firearms (Increased Penalties) Act 1971 and s. 109 of the Penal Code.

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On 27 September 1987 at about 2.15 a.m. a gunman together with another man aided the escape of H from Ward 17 in the General Hospital Alor Setar where H was receiving medical treatment. The question was whether the prosecution had established that the accused was the gunman.

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The prosecution case depended entirely on the evidence of identification of the accused by two policeman, PW6 and PW7 who were guarding H and the identification by a taxi driver, PW14 who identified the accused as one of two persons who had held him up and who had seized his taxi shortly before the offence.

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The accused was arrested in April 1988 about 7 months after the date of the offence. Soon after, the accused participated in two identification parades conducted by Inspector Z whereby the accused was identified as the gunman by PW6 and PW7. PW14 had also earlier identified the accused in an identification parade.

*g***Held:**

[1] Although PW14 was an honest witness, his evidence of identification was fraught with weaknesses. He readily admitted that he could not be sure if the accused was the person who held him up that fateful night although he had identified him as being so. In fact his evidence was that he had a poor view of the two men who had held him up that night. The fact that he had been shown the photograph of the accused just before he attended the identification parade by a police personnel and that he was requested "to hold" the person if he saw that person in the identification parade was a serious infirmity which vitiated the identification parade that was held. Further, he admitted in his testimony that he guessed that the accused was the person he saw on the night of the incident.

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[2] It was highly improper for PW6 and PW7 to be with Inspector Z who was to conduct the parades prior to the identification. The 3 were together in Inspector Z's room for ½ hour before Inspector Z left to conduct the parades and it is not credible that PW6 and PW7 did not know who they were going to identify nor that they did not know that the parades were connected with the identification of the gunman. Further, there were several irregularities in connection with the parades, the most glaring being that at the parade the accused had the dirtiest clothes among all other participants at the parade.

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[3] Under cross-examination PW6 and PW7 admitted that they had seen the photographs of the accused in newspapers and in the police posters at the police station before the identification parades.

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[4] As a result of the poor quality of light at the scene of the alleged offence, it does not seem possible that PW6 could have seen clearly especially since he admitted that this source of light was a small bulb which was not bright. It was hardly credible that he could remember that it was the accused that he saw in all 3 instances as they were mere fleeting glances in poor light in the ward. In addition, he was under stress for, on his own admission, he was shocked when he first saw the gunman, he was dazed when he was knocked on the head with the butt of the gun and he was confused when he was dragged out of the ward.

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[5] As for PW7, he was outside the ward looking into a poorly lit ward when he saw the gunman and another male. He further admitted that he was shocked and that the incident happened so fast. It was highly unlikely that in a fleeting moment lasting 3 or 4 seconds, PW7 who was in a state of shock and who had seen a gunman in a poorly lit area, was able to remember his features.

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[6] Neither PW6 nor PW7 could give any detailed description of the gunman. There was also a striking resemblance between the accused and the man who escaped with the assistance of the gunman. Neither PW6 or PW7 mentioned the striking similarity of the two and this further highlighted the question of whether they could remember the gunman's features from that incident that night.

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[7] Taking into account the unsatisfactory evidence of PW6, PW7 and PW14 and the absence of other evidence to connect the accused with the offence, no *prima facie* case had been established by the prosecution on the identity of the person responsible for the offence and the accused is therefore acquitted without his defence being called.

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[Accused acquitted and discharged.]

Cases referred to:

R v. Turnbull & Ors. [1976] 3 All ER 549 (foll)

Yau Heng Fang v. PP [1985] CLJ (Rep) 350 (foll)

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Legislation referred to:

Firearms (Increased Penalties) Act 1971, s. 3

Penal Code, s. 109

For the accused - K. Kumaraendran; M/s. Kumar Sitham & Co.

For the public prosecutor - Mohammad Zabidin b. Mohd Diah, DPP

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JUDGMENT

KC Vohrah J:

The accused is charged under an amended charge as follows:

That you at about 2.15 a.m. on 27 September 1987, at ward No. 17, at General Hospital Alor Setar, in the District of Kota Setar, in the State of Kedah Darulaman abetted the commission of the offence of escaping from lawful custody by one Hassan bin Sudin and at the time of abetting the said offence you have discharged a firearm with intent to cause death or hurt to one PC 64846 Mohd Rosli and that you have thereby committed an offence punishable under s. 3 of the Firearms (Increased Penalties) Act 1971 read with s. 109 of the Penal Code.

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- a* At the close of the case for the prosecution there were primary facts not inherently incredible which showed that the offence of abetment of the commission of the offence of escaping from lawful custody of Hassan bin Sudin had been established. And the facts, too, showed that the person who abetted the offence discharged a firearm with intent to cause death to police constable Mohd Rosli, PW7.
- b* The question is whether at the close of the case for the prosecution, the prosecution has established that the accused was the man who committed the offence. And the prosecution depends entirely on the evidence of identification of the accused by 2 policemen and a civilian at identification parades which they attended about 7 months after the date of offence.
- On 27 September 1987 at about 2.15 a.m a gunman together with another man aided the escape of a prisoner Hassan bin Sudin from Ward 17 in the General Hospital Alor Setar where the prisoner was receiving medical treatment.
- c* There were two policemen, PW6 and PW7, doing guard duty over this prisoner. PW6 was inside the ward seated on a camp bed near a doorway facing the bed of the prisoner. The prisoner had one of his hands secured by a pair of handcuffs to the bed. PW7 was seated along a passageway outside the ward near the doorway.
- d* At about 2.15 a.m. PW6 heard footsteps behind him "in running motion". He turned his head to the back and at a glance he saw 2 male Malays and immediately one of them discharged a shot. He saw the side of the face of the gunman. He said the man had a moustache but was not sure if he had a beard though later he said the man had no beard. PW6 said he was frightened. He lowered his head towards the right and he heard several other shots being fired. He then felt a pistol directed to the left side of his neck. The man who had discharged the shots requested for the key to the handcuffs of the prisoner and then knocked PW6 on the head with the butt of the pistol. PW6 had 2 cuts on the head and felt dazed. PW6 delayed handing over the key and the man snatched the key from him and handed it to the prisoner who then unlocked the handcuffs. PW6 admitted he had a fleeting glance at the face of the gunman, half of his face when he snatched the key from him and all of the face when he gave the key to the prisoner. In re-examination he also said he again saw the face of the gunman when the accused assisted the prisoner to get down from his bed.
- e*
- f* PW6 said that the companion of the gunman dragged him out of the ward with the gunman and the prisoner trailing behind them. When he was outside the ward he struggled and he fell on the grass. He then got up and chased the 3 men. There was an explosion after which he saw the 3 men get into a white taxi. He then contacted the Police Headquarters and reported the matter but he was confused and gave a wrong registration number for the getaway taxi.
- g* The other guard, PW7, said that at about 2.15 a.m. he heard people walking and stopping at the prisoner's bed and he took half a step forward and he saw 2 male Malays. One of them who had a moustache and wore a peak cap took out a pistol from his jacket and held it with both hands and pointed it in his direction. PW7 said he had a good look at his face. Then he, PW7, retreated 2 or 3 steps. He saw fire coming out from the barrel of the pistol. One of his feet went into the drain and he fell backwards. He got up and then fell again and then he took refuge in ward 16.
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- It was sometime in April 1988 that the accused was arrested. This was after about 7 months had elapsed from the date of the offence. And the accused on 27 April 1987 was made to participate in 2 identification parades held where he was identified by PW6 and PW7 as the gunman who aided prisoner Hassan in escaping. 7 days earlier on 20 April 1988 the accused had been identified in an identification parade by a taxi driver (PW14) as one of two persons
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who had held him up and who had seized his taxi shortly before the offence. The taxi had eventually broken down but before that had happened the man who had seized PW14's taxi had used it to go to the hospital near Ward 17. Subsequently another taxi was seized and was then used as the getaway vehicle from the hospital.

The duty of the Court is to assess the evidence of identification of the 3 witnesses bearing in mind the guidelines set out by Lord Widgery CJ when the English Court of Appeal dealt with 3 appeals that came before the Court in *R. v. Turnbull & Ors.* [1976] 3 All ER 549 - Lord Widgery CJ said at p. 554, that in setting out the guidelines for trial Judges which involve only changes of practice, not law, the Court had tried to follow the recommendation set out in the report which Lord Devlin's committee made for the Home Department in April 1976. His Lordship said that the Court had not followed the report in using the phrase 'exceptional circumstances' to describe situations in which the risk of mistaken identification is reduced as the use of such a phrase is likely to result in a build up of case law as to what circumstances can properly be described as exceptional and what cannot. And case law of this kind is likely to be a fetter on the administration of justice when so much depends on the quality of the evidence in each case. His Lordship stressed that it is quality that matters in the end. The Supreme Court in *Yau Heng Fang v. PP* [1985] CLJ (Rep) 350 at p. 355 has adverted to this case. And it seems to me that the judicial and practical wisdom of the guidelines set out in the case and the stress on the need for quality in the evidence of identification cannot be gainsaid.

Lord Widgery in that case stated, at p. 551, that whenever the case of an accused person depends wholly or substantially on the correctness of one or more identification of an accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification. He should instruct them as to the reason for the warning and should make some reference to the possibility that a mistaken witness could be a convincing one and that a number of witnesses could all be mistaken.

His Lordship in stating, at p. 552, that the Judge should direct the jury to examine closely the circumstances in which the identification of each witness came to be made continued with the following:

How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such description, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury would be reminded that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger.

- a* Bearing in mind the matters that go to the quality of the identification evidence let me first deal with the evidence of the taxi driver PW14. PW14 was an honest witness. In his evidence he also stated that the man who held him up told him as they made a trip near to Ward 17 of the hospital in his taxi (before it finally broke down) that he wanted to take a sick person from the hospital and that the man was his elder brother. As they passed Ward 17 the man said that his elder brother was there and that the police were guarding him. Although the
- b* prosecution did not adduce evidence to show that the accused was related to the prisoner, defence Counsel did indicate that the accused was brother to the prisoner during the cross-examination of PW6. PW14 was an honest witness. That notwithstanding I have to reject his evidence of identification as it was fraught with weaknesses. He readily admitted he could not be sure if the accused was the person who held him up that fateful night although he had identified him as being so. In fact his evidence was that he had a poor view of the 2
- c* men who had held him up that night. But more importantly his evidence was that he had been shown a photograph of the accused just before he attended the identification parade on 20 April 1988 by a police personnel and that he was requested “to hold” the person if he saw that person in the identification parade. I am surprised that he was shown the photograph; that, to my mind, is a serious infirmity which vitiates the identification parade that was held. And in any event, he stated that at the identification parade he carefully looked at the person and “guessed” that the accused was the person. He also said he did not tell the police that he was guessing. He said that from that day until the day of the trial, he kept that (that is, that he was guessing) “in his head”. Clearly, in view of the weaknesses in the evidence of identification of PW14 I have to completely reject his evidence of identification.

- e* Let me now deal with the evidence of PW6 and PW7. Seven months after the date of offence PW6 and PW7 identified the accused as the gunman who aided the escape of prisoner Hassan. This was done at two identification parades held on 26 April 1988 and conducted by Inspector Zamri, PW13. PW6 and PW7 went to great lengths to say that when they were called to attend the identification parades they did not know who they were to identify. They said that on 25 April 1988 they were told by a police personnel that at the request of Inspector Zamri (this was denied by Inspector Zamri) they were to attend an identification
- f* parade the next day. They did not know what it was all about. And they said they still did not know who they were to identify when they met Inspector Zamri in his room in the afternoon before the parades were held. Apart from the fact that it was highly improper for PW6 and PW7 who were to participate in the identification parades to be with Inspector Zamri who was to conduct the parades, before the parade, the fact remains the 3 were together in Inspector Zamri’s room for ½ an hour before Inspector Zamri left to conduct the parades and I do not find it credible that PW6 and PW7 did not know who they were going to identify,
- g* that they did not know the parades were connected with the identification of the gunman. There were several irregularities in connection with the parades but it is sufficient to point out that PW6 said that at the parade the accused had the dirtiest clothes amongst all other participants at the parade he attended and he agreed that that was because the man had been in the lockup for a few days.
- h* PW6 and PW7 stressed that when they identified the accused as the gunman it was as a result of the recollection of the features of the man whom they saw the night of the incident. But reluctantly, under cross-examination, they agreed that they had seen the photographs of the accused in newspapers and in police posters at the police station before the identification parades but they stressed that these did not influence them. I find that hard to believe.
- i* It is necessary to go back to the evidence of PW6 and PW7 in relation to what they saw that fateful night.

In so far as PW6 was concerned on his own admission all lights in the ward, save for one, had been switched off as the patients had retired to bed. The one light that remained switched on was a fluorescent lamp some 60 to 70 feet away from PW6 at one end of the ward in the nurse's room and the light came through an open door of that room. And PW6 admitted that the light from this source was blocked by mosquito nets which were between him and the room. In other words the quality of the light from the fluorescent lamp at the place where PW6 was poor. There was some light which came from outside the ward through the doorway near where PW6 was sitting and where the prisoner's bed was. Although PW6 said that he could see clearly, it does not seem possible he could have seen clearly when he admitted this source of light was a small bulb which was not bright. It seems hardly credible that he could remember that it was the accused that he saw in all 3 instances when he saw the gunman were mere fleeting glances in poor light in the ward and under conditions of stress for, on his own admission, he was shocked when he first saw the gunman, he was dazed when he was knocked on the head with the butt of the gun and he was confused when he was dragged out of the ward.

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As for PW7, he was outside the ward looking into a poorly lit ward when he saw the gunman and another male. He saw a man taking out a gun from the jacket and aiming it. He admitted that he was shocked. He admitted it happened so fast. He retreated 2 or 3 steps and fell backwards.

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I find it highly unlikely that in a fleeting moment lasting 3 or 4 seconds a man who was in a state of shock, seeing a gunman in a poorly lit area is able to remember his features.

The point is neither PW6 nor PW7 could give any description of the gunman save that he was a Malay and that he wore a cap with a peak and that he had a moustache although PW6 at the earlier stages of his evidence (he retracted it later) stated that he also had a beard. Neither was able to give more details by way of description of the gunman though PW6 did say that the gunman was not that dark. But the accused is a man with a fair complexion. And that is a striking feature of the man that neither mentioned. The man who escaped from the hospital that night, Hassan bin Sudin, was brought to Court during the trial to be identified as the man who escaped from police custody that night. And there was a striking resemblance between the two. PW6 and PW7 were pointedly asked if the accused had any distinguishing feature. Neither of them mentioned the striking similarity of the two and one is left to wonder if they really could remember his features from that incident that night.

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Quite clearly the evidence of identification by PW6 and PW7 was far from satisfactory. Bearing in mind that the evidence of the taxi driver too cannot be relied upon for the reasons I had earlier given and in the absence of other evidence to connect the accused with the offence no *prima facie* case has been established by the prosecution on the identity of the person responsible for the offence and the accused is therefore acquitted without his defence being called.

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In doing so I rely on this passage by Mohamed Azmi SCJ in *Yau Heng Fang v. PP* [1985] CLJ (Rep) 350 at p. 355,

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These are the qualities of the two material witnesses for the prosecution which the Court was persuaded to rely on the issue of identification and recognition. If the prosecution depends solely, as in the present case, upon visual identification by one or more witnesses, the Judge must withdraw the case from the jury if the evidence is of poor quality (see *R. v. Turnbull*).

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- a* In our opinion, both from the poor opportunity for the eyewitnesses to recognize the appellant and their poor quality as identity witnesses, their testimony on the issue of identity must be held to be inherently incredible. In the absence of the evidence to connect the appellant with the crime, which is an essential element in any criminal prosecution, no *prima facie* case could have been established by the prosecution and the appellant should therefore have been acquitted without his defence being called.
- b* The accused is acquitted and discharged.

Also found at [1991] 3 CLJ 2568

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